Supreme Court, U.S.
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In The

Supreme Court of the United States

MARVIN WILBUR, JR.,
MARVIN WILBUR, SR., and JOAN WILBUR,

Petitioners,

v.

GARY LOCKE, Governor of the State of Washington; FREDERICK KIGA, Director, Revenue Department of the State of Washington; GARY O'NEIL, Assistant Director, Revenue Department of the State of Washington; and REVENUE DEPARTMENT OF THE STATE OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. LOBSENZ*
JOHN C. DIPPOLD
OF CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
(206) 622-8020
**Counsel of Record*

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the First Amendment Petition Clause guarantee of the right to seek judicial redress of grievances require that FRCP 19(b) be construed and applied in a manner that will avoid dismissal of a suit for failure to join an indispensable party if the effect of such a dismissal would be to deprive the plaintiff, and every member of the public, of a judicial forum where asserted constitutional or statutory violations could be litigated?

2. The Ninth Circuit adheres to the rule that, in all cases where the plaintiff is challenging the validity of a contract, every party to that contract is an indispensable party whose absence requires dismissal of the suit pursuant to FRCP 19(b). Is this inflexible rule in conflict with this Court's decisions in *Provident Tradesmens Bank* and *National Licorice v. NLRB*?

3. Is it error to grant a Rule 19(b) dismissal of a plaintiff's suit against state officials on the grounds that an Indian tribe is an indispensable party when the following circumstances exist: (a) the tribe knows that the lawsuit is pending; (b) the interests of the tribe and the state officials are identical; (c) the tribe refuses to waive sovereign immunity and to consent to being a party defendant, and thus cannot be joined as a party; and (d) the tribe files pleadings in the lawsuit in support of the positions taken by the state officials, and urges the Court to dismiss the lawsuit because the tribe is an indispensable party?

PARTIES TO THE PROCEEDINGS

The Petitioners are Marvin Wilbur, Jr., Marvin Wilbur, Sr., and Joan Wilbur. They are members of the Swinomish Tribe, and they operate a smoke shop located on trust land within the borders of the Swinomish Indian Reservation in northwestern Washington.

Respondents are Gary Locke, the Governor of the State of Washington; and Frederick Kiga and Gary O'Neil, the Director and Assistant Director of the Revenue Department of the State of Washington. The Revenue Department of the State of Washington was a named party defendant but was dismissed as a defendant by the Court of Appeals and is no longer a party to the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Marvin Wilbur, Jr., Marvin Wilbur, Sr., and Joan Wilbur ("the Wilburs"), respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of their suit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 423 F.3d 1101 (9th Cir. 2005), and is reproduced as *Petition Appendix A*. The decision of the District Court granting respondents' motion to dismiss was not reported, and is reproduced as *Petition Appendix B*.

JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND COURT RULE PROVISIONS INVOLVED

Federal Rule of Civil Procedure 19(b) provides:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the

> plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Marvin Wilbur, Jr., Marvin Wilbur, Sr., and Joan Wilbur, are enrolled members of the Swinomish Tribe, and the operators of a retail store located on trust land within the Swinomish Indian Reservation. On April 17, 2003, the Wilburs filed an action against the Governor of Washington and two officials of the Washington State Department of Revenue (hereafter "the Governor"). Their suit sought relief from an anticipated contract, authorized by Wash. Rev. Code § 43.06.450, between the State of Washington and the Swinomish Indian Tribe regarding the taxation of cigarette sales by Indian retailers. *Wilbur v. Locke*, 423 F.3d 1101, 1104 (9th Cir. 2005).

The decision below succinctly describes the statutory requirements that such contracts must meet.

> Such contracts must "provide for a tribal cigarette tax in lieu of all state cigarette taxes and state and local sales and use taxes on sales of cigarettes in Indian country by Indian retailers," but the tribe may "allow an exemption for sales to tribal members." *Id.* § 43.06.455(3) . . . Tax revenue retained by a tribe must be used for certain statutorily defined "essential government services." *Id.* § 43.06.455(8), (14)(a). Thus, cigarette contracts must provide that the state will not impose any tax, and must require a tribe to collect taxes effectively equal to the previously imposed state taxes, and use the revenue for essential government services.

Wilbur, 423 F.3d at 1104.

The Wilburs brought suit while the Governor and the Tribe were negotiating such a cigarette tax contract. They alleged that the state statutes authorizing such contracts, and the specific proposed tax compact between the Tribe and the State, violated the Indian Commerce Clause, *U.S. Constitution*, art. I, § 8, cl. 3; the treaty clause, art. I, § 10; the *Sherman Anti-Trust Act*, 15 U.S.C. §§ 1, 2 & 14; the *Indian Trader Act*, 25 U.S.C. §§ 261 *et seq.*; the *Treaty of Point Elliott*, 12 Stat. 927 (Jan. 22, 1855), and several other statutory and state constitutional provisions. *Id.* at 1105. Recognizing that the Tribe had sovereign immunity and could not be sued without its consent, the Wilburs did not name the Tribe as a party defendant to their suit.

The essence of the Wilburs' claims was that the State of Washington was effectively purchasing the legislative power of the Tribe by inducing the Tribe to enact and impose a tax upon tribal member Indians which the State itself had no power to impose. They argued that Washington State was indirectly regulating commerce among the Indian tribes, even though that power is restricted to Congress by article 1, § 8, cl. 3, and that the State was effectively entering into a treaty with an Indian tribe, contrary to the prohibition against such treaty making which is set forth in article 1, § 10. Similarly, the Wilburs claimed that Washington was evading the state constitutional prohibition set forth in *Washington Constitution*, art. 26, § 2, against the imposition of any taxes upon property located on Indian lands. By creating a contractual obligation to impose a tribal tax upon property which the State itself was powerless to tax, the Wilburs further alleged that the State was violating the *Treaty of Point Elliott*, 12 Stat. 927 (1855). In their complaint they sought "prospective, declaratory and injunctive relief against the Governor of Washington State to prevent him from forcing the Swinomish Tribe to tax Plaintiffs." *Complaint, Introduction*, at p.2. They also sought damages for anti-trust violations under the *Sherman Act*. *Id.* at ¶¶ 37-40.

Before the merits of any of these claims could be addressed, the State defendants filed a motion to dismiss the complaint alleging: (1) that the Wilburs lacked standing